DHARAMJIT SINGH JOHAR SINGH

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 44-127-90]
8 JANUARY 1991

CRIMINAL PROCEDURE: *Arrest and detention - Validity - Two arrests - Reasons of arrest not given in first arrest - Violation of Article 5(3) of Federal Constitution - Whether can be severed from lawful second arrest - Time of issuance of authorisation - Ambiguity in documents - Acts should be consecutive and reasonably practicable - Internal Security Act 1960, s. 73.*

On 18 August 1989, the applicant D was arrested by a Military Officer of the Department of Military Intelligence, Ministry of Defence, Kuala Lumpur (the Military Authority) and was detained for seven days after which he was taken to Sungei Besi and was officially charged with an offence under the Official Secrets Act (OSA) and detained for a day. On 26 August 1989, D was taken to Bentong and again detained until 5 September 1989; on 6 September 1989, he was taken to the police station in Ampang and arrested by H who said he did so under s. 73(1)(a) of the Internal Security Act 1960 (ISA). H then made a police report on the same day wherein he said that he informed D of the grounds of arrest, which was acknowledged in writing by D. Under s. 73(3)(a) of the ISA, H said that on 7 September 1989 he authorised D's continued detention for 24 hours. However this authorisation is dated 6 September 1989 at 1.59 p.m. and authorises the detention of D for 24 hours with effect from 7 September 1989 at 1.59 p.m. D was served with the detention order under ISA on 2 November 1989, authorising his detention for 2 years.

D seeks to impugn the detention order and his subsequent detention on the grounds:

(a) that the initial arrest on 18 August 1989 and subsequent detention by the Military Authority was illegal as it breached art. 5(3) of the Federal Constitution as D had not been informed of the reasons of arrest at the time of arrest as a result of which the second arrest on 6 September 1989 and the subsequent detention were also illegal and that

(b) the second arrest on 6 September 1989 and the subsequent detention by the police under the ISA were illegal as it was not established when the authorisation under s. 73(3)(a) of the ISA had been issued.

Held:

[1] On the evidence it is clear that on 18 August 1989, D was not told of the reasons of his arrest - therefore D's initial arrest and subsequent detention by the Military Authority under the Armed Forces Act were unlawful as it violated art. 5(3) of the Constitution.

[2] However the second arrest and detention, whereby D had been informed of the reasons for arrest was lawful.

[3] Although *prima facie* D is entitled to damages for wrongful arrest and false imprisonment in relation to the first arrest, the initial arrest and detention constitutes a separate and distinct transaction from the second arrest and detention and it is permissible to sever the former transaction from the latter.

[4] The apparent ambiguity between H's affidavit and the police report in relation to authorisation is not whether there was an authorisation but the time of the issue of the authorisation.

[5] (a) The acts of arrest, the making of the police report and the issue of the authorisation could not possibly have occurred at the same precise moment of time; they must have occurred consecutively in that order and as soon as reasonably practicable;

(b) Therefore, para. 7 of H's affidavit which states that the authorisation was issued on 7 September 1989 cannot be correct; furthermore para. 7 refers to the authorisation itself which states that the authorisation was issued on 6 September 1989;

(c) As a result, there was a valid authorisation under s. 73(3)(a) of the ISA.

[D's application dismissed.]

Cases referred to:
Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92
Assa Singh v. Menteri Besar, Johor [1969] 2 MLJ 30
Gour Gopal Mukherjee v. Chief Secretary in the Government of West Bengal [1953] AIR Cal 81
Maqdoom Mohiuddin v. State of Hyderabad [1952] Cr LJ 194
Tan Boon Aun Timbalan Mentri Dalam Negeri, Malaysia & Anor. [1990] 3 CLJ (Rep) 171
Yit Hon Kit v. Minister for Home Affairs & Anor. [1988] 2 MLJ 638

Legislation referred to:
Federal Constitution, art. 5(3)
Internal Security Act 1960, ss. 8, 73(1)(a), 73(3)(a)

For the Applicant - Karpal Singh; M/s. Karpal Singh & Co.
For the Respondents - Noorbahri bin Baharuddin, Federal Counsel

JUDGMENT

Edgar Joseph Jr J:

Dharamjit Singh s/o Johar Singh, the applicant herein, prays for a writ of *habeas corpus ad subjiciendum*, whereby he seeks to impugn both the validity of a detention order dated 3 November 1989, (the detention order) authorising his detention for a period of two years with effect from 3 November 1989 at the Tempat Tahanan Perlindungan, Taiping, made against him by the Menteri Hal Ehwal Dalam Negeri by virtue of the provisions of s. 8 of the Internal Security Act 1960, (the Act) and his detention thereunder.

The essential facts to be garnered from the affidavit evidence may be shortly stated thus: the applicant, a Lieutenant attached to the Malaysian Navy, had on 18 August 1989, at the Ministry of Defence, Kuala Lumpur, been arrested by a Military Officer of the Department of Military Intelligence, Ministry of Defence, Kuala Lumpur, (the Military Authority) and detained there for seven days. Thereafter, he was taken to Sungei Besi where he was officially charged with an offence in contravention of the Official Secrets Act and detained there for one day in a cell. On 26 August 1989 he was taken to Bentong and again detained in a cell where he apparently remained until 5 September 1989.

On the next day - 6 September 1989 - he had been taken to the Balai Polis, Tun Razak, Ampang, Kuala Lumpur, where he was arrested by Inspector Mohd. Hanapi bin Mohd. Sani of Cawangan Khas, Bukit Aman, Kuala Lumpur, who said, in his affidavit affirmed to on 21 November 1990 (Encl 8), that he had done so pursuant to the powers conferred upon him by s. 73(1)(a) of the Act as, based on information he had received concerning the applicant,

he had good grounds for believing that it was necessary to detain the applicant under the provisions of s. 8 of the Act, and he did accordingly detain the applicant with a view to enquiries for that purpose.

Inspector Hanapi then made a police report on the same day - 6 September 1989 - at 1.59 p.m., being Exh. MHMS1 to Encl 8, wherein he alleged that he had arrested the applicant also at 1.59 p.m. that day, pursuant to the provisions of s. 73(1)(a). Inspector Hanapi further alleged in his affidavit that at the time he arrested the applicant, he had informed him of the reasons or grounds for the arrest and was satisfied that the applicant understood the same, and by way of confirmation of this fact, he had obtained an acknowledgment in writing, being Exh. MHMS2 to Encl 8, from the applicant wherein the latter acknowledged that he had been so informed. On a concluding note, Inspector Hanapi added, in his affidavit, that on 7 September 1989, at 1.59 p.m. he had issued an authorisation in writing under s. 73(3)(a) of the Act, being Exh. MHMS3 to Encl 8, authorising the continued detention of the applicant for 24 hours. However, a perusal of Exh. MHMS3 shows clearly that it purports to have been issued **not** on 7 September 1989 at 1.59 p.m., but on 6 September 1989 at 1.59 p.m. and that it purported to authorise the continued detention of the applicant for 24 hours with effect from 7 September 1989 at 1.59 p.m.

On 2 November 1989, at about 9 p.m. the applicant had been served with the detention order.

Before me, Counsel for the applicant has relied upon two grounds to impugn the detention order and the applicant's subsequent detention thereunder.

It was contended, firstly, that the initial arrest on 18 August 1989 and the subsequent detention by the Military Authority, were illegal as not having been effected in pursuance of a valid or legal power, since the applicant had not been informed of the grounds or reasons for his arrest at the time of arrest, with the result that the second arrest on 6 September 1989 and the subsequent detention by the police were also rendered illegal. Secondly, that in any event, the second arrest on 6 September 1989 and the subsequent detention by the police under the act were illegal, it not having been established when the authorisation under s. 73(3)(a) authorising the continued detention of the applicant for more than 24 hours had been issued.

As to ground (1), this alleges a breach of art. 5(3) of the Federal Constitution which reads:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

Now, it was alleged by the applicant, without challenge or contradiction, that upon his initial arrest by the Military Authority on 18 August 1989, he had not been told of the reasons or grounds of his arrest, and that by reason thereof, there had been a violation of art. 5(3).

In *Yit Hon Kit v. Minister for Home Affairs & Anor.* [1988] 2 MLJ 638, I had granted *habeas corpus* on the ground that the detainee there had not been informed of the grounds or reasons for his arrest, at the time of his arrest, and so there had been a violation of art. 5(3). I was not therefore prepared to accept the proposition that an arrest was a continuing act and though an arrest was initially unlawful, it could be rendered lawful upon the arrested person being given reasons even though late. That case can, however, be distinguished on the facts because there, unlike here, there was but one arrest, it being effected by the police.

I accept, as I am bound to, that art. 5(3) of the Constitution applies to any law whatsoever in force in this country. (See *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92 per Wan Suleiman J (as he then was), endorsed by the Federal

Court in *Assa Singh v. Menteri Besar, Johor* [1969] 2 MLJ 30). It follows, therefore, that upon the evidence before me, the applicant's initial arrest and subsequent detention by the Military Authority under the Armed Forces Act, were unlawful, there having been a violation of art. 5(3) of the Constitution. That, however, does not conclude the matter because the question which then arises for decision is: whether the applicant's second arrest and detention - this time by the police under the Act - were lawful since there is no dispute that at the time of such arrest he had been informed of the reasons or grounds therefore.

The learned Federal Counsel contended that the answer to this question was in the affirmative and, in support, relied upon the Indian decisions in the cases of *Gour Gopal Mukherjee v. Chief Secretary in the Government of West Bengal* AIR [1953] Cal. 81 and *Maqdoom Mohiuddin v. State of Hyderabad* [1952] Cr LJ 194.

In reply, Counsel for the applicant relied upon my decisions in *Yit Hon Kit (ibid) and Tan Boon Aun v. Timbalan Mentri Dalam Negeri, Malaysia & Anor.* [1990] 3 CLJ (Rep) 171. In the second of these decisions, I had said, at p. 177, col. 1 E and F,

> In a matter of deprivation of liberty strict compliance with the law is necessary. In particular, if the Court is satisfied that the detention of the subject has not been procured by steps 'all of which were entirely regular' or 'that every step in the process which led to such detention was followed with extreme regularity, the Court will not allow the imprisonment to continue.'

In my opinion, the initial arrest and detention of the applicant by the Military Authority under the Armed Forces Act constituted a separate and distinct transaction from his second arrest and detention by the police under the act, so it is permissible to sever the former transaction from the latter.

Accordingly, although *prima facie,* the applicant would be entitled to damages for wrongful arrest and false imprisonment whilst deprived of his liberty by the Military Authority in violation of art. 5(3), his second arrest by the police, did not suffer from this defect, and the detention which followed was lawful. This ground therefore fails.

As to ground (2), my attention was directed by Counsel to para. 4 of the affidavit of Inspector Mohd. Hanapi bin Mohd. Sani aforesaid and the latter's police report annexed thereto, according to which, the arrest of the applicant had been effected on 6 September 1989 at 1.59 p.m. at the Balai Polis Tun Razak, Kuala Lumpur. But, said Counsel, a perusal of the police report shows that it was recorded on the same day, and at the same time, and that it refers to the fact of the arrest. It was argued, therefore, that since the report must have been made after the arrest, the arrest must have occurred not on 6 September 1989 at 1.59 p.m. but at some time **before** that on that date. Furthermore, my attention was also directed by Counsel to another inconsistency; namely that whereas, according to para. 7 of Inspector Hanapi's affidavit, he had on 7 September 1989 at 1.59 p.m. issued the authorisation under s. 73(3)(a) of the Act for the continued detention of the applicant for 24 hours, being Exh. MHMS3 to Encl 8, a perusal of that authorisation, in particular, the footnote therein, suggests that it was issued on 6 September 1989 at 1.59 p.m.

For the foregoing reasons, it was argued that the inconsistencies aforesaid, gave rise to an ambiguity on the question whether there was any authorisation at all, and that therefore, such ambiguity should be resolved in favour of the applicant, with the result that on this ground alone the Court should rule that his continued detention was unlawful.

I recognise that in preventive detention cases, involving as they do, detention without trial, any ambiguity in the process leading to the subject's detention, should, in the absence of a satisfactory explanation, be resolved in favour of the subject.

Upon the evidence before me, I am satisfied that the apparent ambiguity is **not** as to whether there was an authorisation but as to the **time** when it was issued.

It is blindingly obvious that the acts of arrest, the making of the police report and the issue of the authorisation could not possibly have occurred at the same precise moment of time. In my view, they must have occurred consecutively, in that order, and as soon as reasonably practicable. If these conclusions are correct, as I believe them to be, then obviously para. 7 of Inspector Hanapi's affidavit, which states that the authorisation was issued on 7 September 1989 at 1.59 p.m. cannot possibly be correct. I am fortified in this by para. 7 itself which refers to the authorisation - a contemporary document - which obviously affords the best evidence as to the date when the authorisation was issued. This was, as I have already noted, on 6 September 1989 and, given the circumstances of the case, as soon as practicable after the arrest.

It follows therefore, that I am satisfied that there was a valid authorisation under s. 73(3)(a) of the Act, authorising the applicant's continued detention for more than 24 hours and, accordingly, this ground also fails.

The result, therefore, is that the attempt to impugn the detention order and the applicant's detention thereunder fails and so this application must be, and is, dismissed.

Also found at [1991] 1 CLJ 737